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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

B.D.A.C., a minor, and VERONICA LILIANA COTTO YOC, on behalf of herself and B.D.A.C.,

Petitioners/Plaintiffs,

v.

SCOTT LLOYD, in his official capacity as Director of the Office of Refugee Resettlement, and ELICIA SMITH, in her official capacity as Federal Field Specialist, Office of Refugee Resettlement,

Respondents/Defendants.

Case No. 18-cv-06791-NC

NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HABEAS PETITION AND PRELIMINARY INJUNCTION MOTION

Date:	December 19, 2018
Time:	1:00 p.m.
Courtroom:	7 – 4th Floor
Judge:	Hon. Nathanael Cousins
Date Filed:	November 8, 2018
Trial Date:	Not yet set

NOTICE OF MOTION

PLEASE TAKE NOTICE that, on Wednesday, December 19, 2018,[1] at 1:00 pm, or at such other time as the Court may direct, before the Honorable Nathanael Cousins, United States District Court, 280 S. First Street, San Jose, California 95113, Petitioners will, and hereby do, move the Court for a preliminary injunction for the following reasons:

1. Respondents' detention of Petitioner B.D.A.C. violates Petitioner Veronica Liliana Cotto Yoc's substantive due-process rights because that detention infringes upon Ms. Cotto Yoc's right to family integrity.
2. Respondents' detention of B.D. violates Ms. Cotto Yoc's procedural due-process rights because Respondents have separated Ms. Cotto Yoc and B.D. without providing Ms. Cotto Yoc with notice, a right to counsel, an opportunity to respond including an opportunity to present and confront evidence, a neutral decisionmaker, a written decision, and a right of appeal.

In addition, as Petitioners explain in their concurrently filed Emergency Request for an Order to Show Cause and Motion to Shorten Time, Petitioners anticipate that the Court will hear oral argument on their petition for a writ of habeas corpus at the same time as their motion for a preliminary injunction is heard. The Court should issue the writ because:

1. Respondents' detention of B.D. violates his substantive due-process rights because such detention (i) is not tailored to the needs of the situation and (ii) infringes upon his right to family integrity.
2. Respondents' detention of B.D. violates his procedural due-process rights because Respondents have detained B.D. without providing him with notice, a right to counsel, an opportunity to respond including an opportunity to present and confront evidence, a neutral decisionmaker, a written decision, and a right of appeal.
3. Respondents' detention of B.D. violates 8 U.S.C. § 1232 because Respondents have failed (i) to act promptly or (ii) to place B.D. in the least restrictive environment that is

[1] Respondents concurrently file a Motion to Shorten Time such that the Court hears arguments on an earlier date.

in his best interests.

4. Respondents' detention of B.D. violates 5 U.S.C. § 706 because their actions are arbitrary and capricious, not in accordance with the law, and stop short of providing B.D. with his statutory rights.

5. Respondents' detention of B.D. violates 29 U.S.C. § 794 because Respondents have subjected B.D. to such detention because of disability.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities below, the concurrently filed Declaration of Travis Silva In Support Of Petitioners' Petition for a Writ of Habeas Corpus and Motion for a Preliminary Injunction and its exhibits, the Amended Petition and Complaint filed in this matter and its exhibits, and such other and further papers, evidence, and argument as may be submitted to the Court.

Dated: November 14, 2018

KEKER, VAN NEST & PETERS LLP

By: */s/ Travis Silva*
SIMONA A. AGNOLUCCI
TRAVIS SILVA

Attorneys for Petitioners/Plaintiffs
B.D.A.C. and VERONICA LILIANA COTTO YOC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is tragic. Respondents are Office of Refugee Resettlement (ORR) officials. Petitioner B.D.A.C. is a seventeen-year-old youth from Guatemala. He experienced substantial trauma as a child, suffers from significant Posttraumatic Stress Disorder, and came to the United States in December 2017 seeking asylum. But the government immediately took him into custody, and for the last eleven months it has held him in what it calls "child-welfare custody." The reality of this custody is grim; for the last ten months, the government has confined B.D. to locked juvenile halls in Virginia and California without alleging any criminal wrongdoing or providing him with a hearing to challenge his detention.

When B.D. arrived in the United States, his mother, Petitioner Veronica Liliana Cotto Yoc, was already living in Ohio. She is a fit parent (even ORR recognizes that she and B.D. have a "close, positive relationship"), and within days of his arrival she asked the government to grant her custody. ORR has a specific statutory duty to act upon this request "promptly." But, astoundingly, in the eleven months that have passed since Ms. Cotto Yoc made her request, the government has failed to adjudicate it. Instead, Respondents have obfuscated at every turn. They demanded, for example, to inspect Ms. Cotto Yoc's home, then delayed the inspection, then refused to consider the recommendation of the inspecting social worker. Respondents refuse to explain their delay, deflecting inquiries from counsel with bureaucratic non-answers. And all the while, B.D. remains confined in juvenile detention facilities.

The writ of habeas corpus exists to protect all people in this country—including non-citizens—against arbitrary imprisonment. As these papers explain, the imprisonment in this case is arbitrary. It violates several federal statutes, and it violates the Constitution. The Court should right these wrongs by ordering Respondents to immediately release B.D. to his mother's care.

II. FACTUAL BACKGROUND

A. With the love and support of his mother, B.D. survived a difficult childhood, overcoming sexual assault, a kidnapping, and child abuse and neglect.

B.D. has not yet had a very good chance at life. Born in 2001, he suffered child abuse at the hand of his father up to age seven, then again at the hand of his grandmother from ages seven to

nine. At age nine, B.D. was repeatedly raped by his family's landlord. In 2017, around his sixteenth birthday, he was kidnapped by Guatemalan gang member and held for ransom for four days. When the Guatemalan police rescued B.D., they found him wearing unfamiliar clothes and in a drugged state. Gang members continued to threaten him and his family after his rescue. ECF No. 13, Ex. A, Declaration of V. L. Cotto Yoc (Cotto Yoc Decl.) at ¶¶ 2, 6, 9, 16.

As he's overcome these traumas, B.D.'s North Star has been his mother. Ms. Cotto Yoc removed B.D. from the households where B.D. suffered childhood abuse. While B.D. did not tell his mother about the rapes, Ms. Cotto Yoc sensed that something abnormal had occurred to her son and obtained the professional services of a psychologist to assist her parenting. B.D. told the therapist about the rapes he had suffered, and the therapist relayed this information to Ms. Cotto Yoc, who then acted to support her son. *Id.* at ¶ 3, 7, 9.

Ms. Cotto Yoc migrated to the United States in 2016. She struggled as she decided whether to bring B.D. along with her, but ultimately decided he was too vulnerable to travel to an unfamiliar country. She left him in the care of her adult daughter, B.D.'s older sister, and journeyed north. Immigration officials arrested Ms. Cotto Yoc and granted her an interview to determine if she had a credible fear of future persecution such that she is entitled to apply for asylum. She passed the interview and was released from immigration detention. She now resides in Ohio. *Id.* at ¶¶ 11, 12.

Consequently, Ms. Cotto Yoc was not in Guatemala when B.D. was abducted in 2017. Nevertheless, from the United States, she reported her son's disappearance to the police, organized her family's search efforts, and sent money to Guatemala so that her family could print and circulate flyers. *Id.* at ¶ 16. Nobody has ever alleged that Ms. Cotto Yoc is an unfit parent; indeed, the ORR social worker who evaluated this case noted that mother and son have a "close, positive relationship." Declaration of Travis Silva in Support of Petition for a Writ of Habeas Corpus and Motion for Preliminary Injunction (Silva Decl.), Ex. A (Home Study Report) at 28.

B. When he arrived in the United States, B.D. suffered from significant Posttraumatic Stress Disorder.

Unsurprisingly, the childhood trauma B.D. survived caused him to develop Posttraumatic Stress Disorder (PTSD). B.D. received his first psychological evaluation at age eleven. At that time, B.D. was bathing himself twice a day. While he previously had no behavioral problems at school,

he began to struggle getting along with his male peers. The evaluating psychologist became the first adult to whom B.D. disclosed his prior sexual assault. The psychologist informed Ms. Cotto Yoc about the rapes and explained that B.D.'s behavior stemmed from that incident. ECF No. 13, Ex. A, Cotto Yoc Decl. at ¶ 9.

At the time of this filing, B.D. has been in ORR custody for over eleven months. During this time, only one independent mental health professional has evaluated B.D.[2] Dr. Yenys Castillo is a licensed clinical psychologist who specializes in trauma-related disorders. She has worked in secure facilities and community mental health clinics and focuses on family- and juvenile-related issues. Silva Decl., Ex. B (Castillo Eval.) at ¶ 1. As part of her assessment, Dr. Castillo interviewed B.D. and Ms. Cotto Yoc and reviewed B.D.'s ORR records. Dr. Castillo determined that B.D. suffers from Posttraumatic Stress Disorder (PTSD) stemming from his adverse childhood experiences. As a result of PTSD—which preexisted B.D.'s detention—B.D. avoids memories of or thinking about his trauma; views the world and others as unsafe; struggles to concentrate; has sleep disturbances and nightmares; displays hypervigilance and hyperarousal; and has disturbing and recurrent memories. *Id.* at ¶ 27. Dr. Castillo also determined that B.D. suffers from Adjustment Disorder. Dr. Castillo opines that the cause of B.D.'s Adjustment Disorder is his prolonged separation from his mother and his exposure to "violence and other negative detention conditions" in ORR's locked facilities. Dr. Castillo believes that "at this point, detention conditions are perpetuating [B.D.'s] adjustment disorder, and contributing to his psychological and social deterioration." *Id.* at ¶ 28. Dr. Castillo also opines that at present B.D. is not legally competent. *Id.* at ¶ 29. She recommends that to restore competence, he receive "trauma-informed care" on an outpatient basis "reunited with his mother and siblings as many of his psychiatric difficulties are connected to being separated from his family." *Id.* at ¶¶ 30, 31.

C. Respondents have detained B.D. in locked juvenile halls, subjecting him to prolonged separation from his mother.

After the Guatemalan police rescued B.D. from his kidnappers in 2017, the gang members

[2] ORR-affiliated psychologists evaluated B.D. in January and August 2018. These reports pre-date Dr. Castillo's report and neither evaluator spoke with Ms. Cotto Yoc to obtain B.D.'s full life history before making their assessment.

responsible for the kidnapping made increasingly intimidating phone calls and other threats to B.D.'s family. In the face of these threats, B.D., along with an adult sister and her family, journeyed to the United States. They were arrested by immigration authorities. The Department of Homeland Security (DHS) released B.D.'s sister and children after just a few days of immigration detention. ECF No. 13, Ex. A (Cotto Yoc Decl.) at ¶¶ 17-18. But because B.D. was not traveling with a parent, DHS classified him as an unaccompanied minor and, instead of releasing him along with his family, placed him in the custody of ORR.

1. ORR has a mandate to care for unaccompanied minors and to reunify them with their parents.

ORR is the federal agency that cares for unaccompanied minors. Respondent Lloyd is the Director of ORR and Respondent Smith is the San Francisco-based ORR official with direct oversight over B.D.'s case. The Trafficking Victims Protection Reauthorization Act (TVPRA) imposes upon Respondents a statutory mandate to "promptly" place B.D. "in the least restrictive setting that is in [his] best interest[s]." 8 U.S.C. § 1232(c)(2)(A). That setting is oftentimes with a family member. (In that sense, the term "unaccompanied" is somewhat narrow; it refers to the child's status at the time of apprehension.)

ORR's placement obligations are informed by the settlement in *Flores v. Whittaker*.[3] The *Flores* Settlement contains a "general policy favoring release." ECF No. 13, Ex. B (*Flores* Settlement) at 6. The Settlement requires that "[w]here [ORR] determines that the detention of the minor is not required either to secure his or her timely appearance before [immigration authorities] or the immigration court, or to ensure the minor's safety or that of others, [ORR] shall release a minor from its custody without unnecessary delay, in the following order of preference." *Id.* at ¶ 14. The first-listed preference category is "a parent." *Id.* at ¶ 14(A).

While ORR works to reunify children with their families, the children remain in ORR-run facilities. There are three types of ORR facilities: "(1) secure facility; (2) staff-secure facility; and (3) shelter care facility. A secure facility has the most restrictive custodial condition and it is in many ways akin to juvenile jails; a staff-secure facility is less restrictive than a secure facility, but

[3] *Flores v. Whittaker*, No. 85-cv-4544 (C.D. Cal.). The *Flores* Settlement is at ECF No. 13, Ex. B.

movement within it is substantially controlled; and a shelter care facility is the least restrictive custodial setting." *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 608 (S.D.N.Y. 2018). When he became ORR Director, Respondent Lloyd instituted a new "director review policy," reserving for himself the "release decision" pertaining to any youth who ORR had ever detained in a secure facility. *Id.* Two courts have ordered Respondent Lloyd to discontinue this policy, and ORR has represented that it has done so.[4] Silva Decl., Ex. J (A. Bena 6/28/18 email to Federal Field Specialists).

2. Instead of reunifying Petitioners, ORR has subjected them to a period of prolonged separation.

B.D. entered ORR custody on December 12, 2017. Silva Decl., Ex. C (UAC Assessment) at 1. His first placement was at Casa Padre, a former Walmart (now youth shelter) in Brownsville, Texas. Silva Decl., Ex. D (6/14/18 Washington Post article). (A youth shelter is the least restrictive setting ORR maintains. *See supra*, p. 4.) B.D. did not engage in aggressive behavior while at Casa Padre. Silva Decl., Ex. E (Transfer Request) at 2. However, ORR alleges that there B.D. admitted that he had been a gang member for two years, during which time he had stabbed a man during a robbery. Silva Decl., Ex. C (UAC Assessment) at 3. On the sole basis of this purported admission, ORR "stepped up" B.D. to a secure facility—the most restrictive type ORR maintains—the Northern Virginia Juvenile Detention Center. Silva Decl., Ex. E (Transfer Request) at 2.

The alleged admission is untrue. The most important ORR record in this case (discussed in more detail below) observes that "there is ***no evidence*** that the youth is a gang member. An Interpol check was conducted for the youth and there is no criminal history on his record." Silva Decl., Ex. A (Home Study Report) at 11 (emphasis added). That same report notes that "the youth's 'memory is not reliable' and the youth reported things that [ORR] later found to be untrue. . . . [D]ue to the youth's mental health condition, his descriptions are not to be taken as fact and 'must be corroborated with other sources.'" *Id.* This notation is consistent with Dr. Castillo's conclusion that B.D. "has an impaired capacity to provide a coherent narrative of his life." Silva Decl., Ex. B (Castillo Eval.) at ¶ 29. Furthermore, Ms. Cotto Yoc testifies that B.D. has never been involved in a

[4] *L.V.M.*, 318 F. Supp. 3d at 620, struck down the director-review policy because it violated the APA. The *Flores* court held the policy violated the Settlement and could not be enforced against any child placed in a secure facility based on "incomplete, inaccurate, or erroneous information." Order, *Flores v. Sessions*, No 85-cv-04544-DMG, ECF No. 470 at p. 32.

gang. ECF No. 13, Ex. A (Cotto Yoc Decl.) at ¶ 22. And when the Guatemalan police rescued B.D. from his kidnappers, they treated him as the victim, not as a criminal. *See id.* at ¶ 16. Nevertheless, on the sole basis of this admission, ORR transferred B.D. to secure facilities, continuing to detain him in locked juvenile halls long after ORR recognized that B.D. is not a gang member.

Respondents have confined B.D. to locked juvenile halls since he entered the Virginia facility on December 19, 2017. He remained there until July 27, 2018. While B.D.'s medical records from this period are incomplete, at an unknown time an unidentified ORR staff member started B.D. on an unknown course of psychotropic medication for an unspecified reason. Silva Decl., Ex. B (Castillo Eval.) at ¶ 32. After this, as B.D. spent more time in the Virginia facility, his mental health, already compromised by his childhood trauma, declined precipitously. In March 2018, ORR obtained a state-court order committing B.D. to a psychiatric facility because he "had an altercation with another [juvenile hall] resident . . . and developed suicidal ideation after this altercation." Silva Decl., Ex. F (Discharge Summary) at 2. B.D. remained in the facility for five days. Notably, during this time the facility staff discontinued the use of psychotropic medication, instead providing B.D. with melatonin supplements, Ibuprofen, and encouragement to "continue to be in counseling." At discharge, he was "engaging in pro-social behaviors and was generally respectful toward peers and staff." *Id.* at 4. He was discharged without medication.

ORR transferred B.D. to the Yolo County facility on July 27. While at Yolo, B.D. has not experienced any incident on the same level as the March commitment. However, ORR's records show that while detained B.D. has acted aggressively toward others and self-harmed. This behavior is consistent with Dr. Castillo's conclusion that detention is "contributing to his psychological and social deterioration." Silva Decl., Ex. B (Castillo Eval.) at ¶ 28. ORR's response to B.D.'s struggles is harmful. On various occasions, for example, correctional staff have restrained B.D. using different restraints such as armbars and a "restraint chair." Silva Decl., Ex. G. These "environmental triggers" can be "reminiscent of the trauma [B.D.] endured and can significantly worsen his psychological functioning." Silva Decl., Ex. B (Castillo Eval.) at ¶ 31.

D. For over eleven months, Respondents have impeded Ms. Cotto Yoc's efforts to reunify her family.

Ms. Cotto Yoc sought to obtain custody of B.D. almost immediately after he entered ORR

custody. In December 2017, Ms. Cotto Yoc notified ORR that she wanted to sponsor B.D.'s release. Silva Decl., Ex. C (UAC Assessment) at 6; ECF No. 13, Ex. A (Cotto Yoc Decl.) at ¶ 20. But despite its mandate to act "promptly," ORR failed to conduct a study of Ms. Cotto Yoc's home until June 13, 2018—six months after her request. The ORR contractor conducting the study, Linea Webb, noted in her "Home Study Report" that B.D. and his mother have a "close, positive relationship." Silva Decl., Ex. A (Home Study Report) at 28. Ms. Webb observed Ms. Cotto Yoc interacting with the other children in her home in a "caring, respectful manner" and noted that Ms. Cotto Yoc is "resilient, as she has overcome significant trauma and life challenges." *Id.* at 15, 17. Ms. Webb reported that Ms. Cotto Yoc "appears to be capable of providing and maintaining a safe home for the youth." *Id*. at 27. She nevertheless recommended against releasing B.D. to Ms. Cotto Yoc due to B.D.'s "significant mental health concerns and behavioral issues," opining that at that time Ms. Cotto Yoc was not yet prepared to meet B.D.'s mental healthcare needs. *Id*. at 31.

ORR has never acted on Ms. Webb's preliminary recommendation, either by adopting it or by releasing B.D. to his mother. No government official has explained the delay to Ms. Cotto Yoc. ECF No. 13, Ex. A (Cotto Yoc Decl.) at ¶ 21. Counsel was also unable to obtain information from ORR. On September 10, 11, and 27, counsel contacted the ORR contractors responsible for B.D.'s case to inquire about the status of Ms. Cotto Yoc's family-unification petition. The contractors refused to provide a timeline for a decision or any meaningful information about the process. On October 31, counsel wrote a five-page letter to Respondent Smith and her supervisor, explaining why ORR should act expeditiously to release B.D. and requesting a response by November 7. On November 7, Respondent Smith replied stating that Ms. Cotto Yoc's petition had been pending with Respondent Lloyd since before B.D.'s July 27 arrival at the Yolo County juvenile hall. She declined to provide a timeline for receiving a decision in this case. Silva Decl., Exs. H & I.

III. ARGUMENT

A. Jurisdiction and venue are proper in this District.

1. This Court has jurisdiction over this habeas petition.

This Court has habeas jurisdiction even though Yolo County is within the Eastern District of California. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), guides the analysis of who petitioners must

name as the correct respondent in a habeas action. In general "in habeas challenges to present physical confinement—'core [habeas] challenges'—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.' *Id.* at 435. *Padilla* noted, however, that the Supreme Court had previously "left open the question whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending deportation." *Id.* at 435 n.8. *Padilla* did not resolve this question. *Id.* Thus, *Padilla* guides but does not resolve the jurisdictional inquiry, which is complicated here because Respondent Lloyd in Washington D.C. is the relevant national policy-maker; Respondent Smith in San Francisco is the federal official with the most immediate control over B.D.; and B.D. is detained in a non-federal facility located in the Eastern District.

A court of this District encountered identical facts in *Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017), *aff'd*, 905 F.3d 1137 (9th Cir. 2018), and held that this District is the proper venue to adjudicate a habeas petition (1) brought by a child (2) detained in the Yolo County facility (3) by these same exact Respondents. The *Saravia* petitioner was detained in the Yolo County Juvenile Detention Facility at the time he brought his habeas claim.[5] *Id.* at 1183. *Saravia* surveyed the different approaches courts have taken when determining which official is the proper respondent in a habeas action challenging immigration detention that, as here, occurs in a non-federal facility pursuant to a contract with the federal government. *Saravia* concludes:

> Where a petitioner is held in a facility solely pursuant to a contract, rather than by the state or federal government itself, application of the immediate custodian rule must take account of that fact. Instead of naming the individual in charge of the contract facility—who may be a county official or an employee of a private nonprofit organization—a petitioner held in federal detention in a non-federal facility pursuant to a contract should sue the federal official most directly responsible for overseeing that contract facility when seeking a habeas writ.

280 F. Supp. 3d at 1185 (internal citation omitted). Following *Saravia*, Respondent Smith is the proper respondent here. As the Federal Field Specialist with oversight over the Yolo County facility, she is the federal official who exercises "immediate control" over B.D.'s placement

[5] The *Saravia* petitioner was transferred after he filed his petition but before the court granted the habeas petition. The government did not contest that "the relevant time period for purposes of determining the proper respondent is when he filed his initial habeas petition, notwithstanding his later transfer to a different facility and his decision to amend his pleading after that transfer." 280 F. Supp. 3d at 1183 n.6. This conclusion is consistent with *Padilla*. *See* 542 U.S. at 441.

decisions. *Id*. at 1187. Indeed, *Saravia* concluded that Respondent Smith—who held the same ORR position then as now—was the correctly named respondent in that action. *Id.* at 1186.

2. This District is the proper venue for Ms. Cotto Yoc's personal claims.

This Court is also the proper venue for the constitutional claims Ms. Cotto Yoc brings on her own behalf. Where the defendant is an "officer or employee of the United States," venue is proper in the judicial district where "a defendant in the action resides" or where "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(e)(1). Because Respondent Smith maintains her office in San Francisco, venue is proper in this District.

Alternatively, venue is proper under the pendent venue doctrine. Once "'a court has determined that venue is proper as to one claim, it may exercise pendent venue to adjudicate closely related claims.'" *Saravia*, 280 F. Supp. 3d at 1191 (quoting *United Tactical Sys. LLC v. Real Action Paintball, Inc*., 108 F. Supp. 3d 733, 753 (N.D. Cal. 2015)). As in *Saravia*, "it's quite clear that any additional declaratory and injunctive relief [sought] is closely related to the factual and legal bases for [the] habeas petition." *Id.* at 1192. Because the "right to the preservation of family integrity encompasses the reciprocal rights of both parent and children," the Court's analysis of B.D.'s due-process claim will overlap with an analysis of his mother's reciprocal rights. *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). Under these circumstances, pendent venue is proper here. *See Serv. Women's Action Net. v. Mattis*, 320 F. Supp. 3d 1082, 1089 (N.D. Cal. 2018).

B. Because Respondents are detaining B.D. in violation of the Constitution, the immigration laws, and their other legal obligations, this Court should issue a writ of habeas corpus.

Non-citizens enjoy the constitutional "Privilege of the Writ of Habeas Corpus." *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting U.S. Const. Art. I, § 9, cl. 2). This Court has authority to grant the writ where a person is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). If the Court finds that B.D.'s detention violates a constitutional right or statute, it should issue the writ.

1. Respondents' detention of B.D. violates B.D.'s substantive due-process rights.

Respondents have violated B.D.'s due-process rights to family integrity and to liberty.

a. The detention violates B.D.'s right to family integrity.

Substantive due process bars government interference with fundamental rights "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). "The substantive due process right to family integrity or to familial association is well established." *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1079 (9th Cir. 2011). Children possess a "constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from intimacy of daily family association." *Kia P. v. McIntyre*, 235 F.3d 749, 759 (2d Cir. 2000) (quotation marks and alteration omitted). "Just as parents possess a fundamental right with respect to their children, children also enjoy a 'familial right to be raised and nurtured by their parents.'" *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016) (quoting *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002)). The family-association right protects parents' right to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state. *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). There is "no dispute the constitutional right to family integrity applies to aliens." *Ms. L. v. U.S Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1161 (S.D. Cal. 2018). "Where substantive due process applies . . . the 'threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Id*. at 1165 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). This year, at least five courts have held that various Trump Administration family-separation policies violate the substantive family-integrity right.[6]

In this case, the government's conduct shocks the conscience and so is unconstitutional. *Ms. L* is instructive. *Ms. L* granted a nationwide preliminary injunction in a case involving the separation of immigrant mothers who entered the United States, seeking asylum, with their children. The government separated the arriving mothers and children, with the mothers remaining

[6] *Ms. L. v. U.S ICE*, 302 F. Supp. 3d 1149, 1161 (S.D. Cal. 2018) (parents' rights violated); *Jacinto-Castanon de Nolasco v. U.S. ICE*, 319 F. Supp. 3d at 500 & 501 n.4 (similar); *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 120 (D.D.C. 2018) (similar); *J.S.R. by & through J.S.G. v. Sessions*, -- F. Supp. 3d --, 2018 WL 3421321 (D. Conn. July 13, 2018) (children's rights violated); *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1126 (N.D. Ill. 2018) (same). In these cases, parents and children were in immigration custody. Their reasoning applies with equal force to a situation where a non-detained parent is in immigration proceedings and her child is in immigration detention.

in "adult" immigration detention (administered by DHS) and the children remaining child-welfare custody (administered by ORR).[7] The separation lasted between four and five months. *Id.* at 1154-55. There was no allegation that the mothers were unfit parents. *Id.* at 1165. *Ms. L* held:

> These allegations sufficiently describe government conduct that arbitrarily tears at the sacred bond between parent and child, and is emblematic of the exercise of power without any reasonable justification in the service of an otherwise legitimate governmental objective. Such conduct . . . is brutal, offensive, and fails to comport with traditional notions of fair play and decency. At a minimum, the facts alleged are sufficient to show the government conduct at issue "shocks the conscience" and violates Plaintiffs' constitutional right to family integrity.

Id. at 1167. The district court held that the plaintiffs had stated a substantive due-process claim and eventually enjoined the government from pursuing the family-separation policies at issue. *Id.* (denying motion to dismiss); 310 F. Supp. 3d 1133, 1149 (fashioning injunction).

The government's conduct in this case is far more outrageous than in *Ms. L* because here (1) as there, Ms. Cotto Yoc is a fit parent; (2) B.D. is entitled to receive the mental healthcare that his mother has arranged for him; (3) B.D. is entitled to his mother's assistance in pressing his immigration case (and Ms. Cotto Yoc is already complying with immigration authorities herself); (4) Respondents are aware that B.D. is not gang-involved; (5) the family separation is prolonged; (6) by detaining B.D. in the Yolo facility, Respondents retraumatize B.D., inhibiting him from addressing his mental health needs; (7) Respondents are aware that B.D.'s continued detention ***increases*** the likelihood that he will be involved in future violence; and (8) Respondents have knowingly violated their obligations under the TVPRA and the *Flores* Settlement.

First, as in *Ms. L*, this case involves a fit parent. The record compels the conclusion that Ms. Cotto Yoc is a loving parent capable of protecting her son

- When Ms. Cotto Yoc learned that B.D.'s grandmother was abusing him, she removed B.D. from that environment. ECF 13, Ex. A (Cotto Yoc Decl.) at ¶ 7.
- When Ms. Cotto Yoc observed B.D.'s behavior problems, she arranged (at great expense) for B.D. to receive a psychological evaluation, one that revealed to Ms. Cotto Yoc for the first time that B.D. was a survivor of childhood rape. *Id.* at ¶ 9.

[7] One mother served a 25-day criminal sentence after being convicted of illegal entry into the United States. She was then transferred to civil immigration detention. 302 F. Supp. 3d at 1155.

- When B.D. was kidnapped, Ms. Cotto Yoc—from the United States—reported his disappearance to the police, directed a family search effort, and sent money to Guatemala so that flyers could be printed and distributed. *Id*. at ¶ 16.
- Ms. Cotto Yoc initiated the family-reunification process promptly. She submitted to two fingerprint checks. She permitted ORR to conduct a home study. She otherwise complied with ORR's recommendations. *Id.* at ¶ 20.
- Ms. Cotto Yoc has arranged for B.D. to receive, upon release, appropriate mental health services consistent with Dr. Castillo's recommended treatment plan. Catholic Charities of Southwestern Ohio will provide therapy, medication management, case management, and other supports. ECF 13, Ex. D (Enrollment Verifications).
- Ms. Cotto Yoc has also enrolled in parenting classes so that she can further support her child's re-entry into the community. *Id.*

Because Ms. Cotto Yoc is a fit parent, her relationship with B.D. is entitled to substantial constitutional protection. *See Jacinto-Castanon de Nolasco v. U.S. Immigration & Customs Enf't*, 319 F. Supp. 3d 491, 501 (D.D.C. 2018) (sustaining parent's substantive due-process challenge where there was no "suggestion that she is an unfit mother or poses a danger to her sons").

Second, Respondents continue to detain B.D. even though he will receive appropriate mental health treatment upon release. B.D. is entitled to have his mother, rather than the state, make "important medical decisions" for him. *Wallis*, 202 F.3d at 1141. It appears that Ms. Webb's recommendation against family reunification was "[d]ue to the youth's significant mental health concerns and behavioral issues."[8] Silva Decl., Ex. A (Home Study Report) at 31. Even if that concern was valid at the time, it is no longer because (1) Ms. Cotto Yoc arranged for Dr. Castillo to evaluate B.D.'s mental health-related needs; (2) Dr. Castillo opined that B.D. needs trauma-informed outpatient mental health treatment services, then (3) Ms. Cotto Yoc arranged for B.D. to receive those same services upon release. *Compare* ECF No. 13, Ex. D (enrollment verifications)

[8] The Home Study Report can be read to give another but irrational reason to support the recommendation against removal: a perceived "discrepancy" regarding how B.D.'s family paid for his journey to the United States. *See* Silva Decl., Ex. A (Home Study Report) at 31. As Petitioners have explained to Respondents, there is no discrepancy. Silva Decl., Ex. I at 4.

with Silva Decl, Ex. B (Castillo Evaluation) at ¶ 31. The Constitution protects B.D.'s right to receive the medical treatment his mother arranged for him. *See Wallis*, 202 F.3d at 1141.

Third, B.D. has a right to his mother's assistance in his removal proceedings. *Ms. L*, 310 F. Supp. 3d at 1144 (family separation has a "profoundly negative effect on . . . the children's immigration proceedings); *cf. Wallis*, 202 F.3d at 1141 (children have a right to their parents' guidance in making medical decisions). Given Dr. Castillo's concerns regarding B.D.'s legal competence, it is especially important for him to receive his mother's guidance on these matters. Moreover, Ms. Cotto Yoc is capable of ensuring that B.D. complies with instructions from immigration authorities. Like her son, Ms. Cotto Yoc is in removal proceedings. She has complied with government instructions; while the government initially subjected her to electronic monitoring, it relieved her of that obligation after several months of compliance with all immigration authorities' instructions. ECF No. 13, Ex. A (Cotto Yoc Decl. at ¶ 12.) Ms. Cotto Yoc is preparing to present her own asylum case in immigration court. *Id.* Her son is entitled to her assistance in presenting his. *See Ms. L*, 310 F. Supp. 3d at 1144; *cf. Wallis*, 202 F.3d at 1141.

Fourth, many of Respondents' actions in this case have been motivated by their mistaken concern that B.D. was gang-involved in Guatemala. Any continued reliance on this justification is irrational. Even assuming B.D. stated in December 2017 that he was a gang member, Respondents now know that statement to be (1) incorrect and (2) made by an individual with significant mental health-related disabilities. This excerpt appears in the Home Study Report:

> This writer interviewed the youth's shelter clinician, who reported that the youth's "memory is not reliable" and the youth reported things that they later found to be untrue. The shelter clinician stated that due to the youth's mental health condition, his descriptions are not to be taken as fact and "must be corroborated with other sources." The shelter clinician acknowledged that there are several SIRs regarding the youth throwing gang signs and stated that the youth may be imitating other residents or being provoked by other residents to use gang signs, and ***there is no evidence that the youth is a gang member***. An Interpol check was conducted for the youth and there is no criminal history on his record.

Silva Decl., Ex. A (Home Study Report) at 31 (emphasis added). Ms. Cotto Yoc submitted sworn testimony confirming that B.D. has never been gang involved. ECF No. 13, Ex. A (Cotto Yoc Decl.) at ¶ 22. When the Guatemalan police rescued B.D. from his kidnappers, they treated him as a crime victim rather than a criminal. *See id.* at ¶ 16. There is no basis to believe the alleged

December 2017 statement, and so Respondents cannot rely upon it as a detention rationale.

Fifth, the length of time Petitioners have been separated is exceptionally prolonged. *Ms. L* found that four- and five-month-long periods of separations were conscience-shocking. *Ms. L*, 302 F. Supp. 3d at 1154-55. Here, B.D. and Ms. Cotto Yoc have been separated for almost a year. The separation has been painful for B.D. In his letter to the Court, he explains:

> My mom and family live in Ohio. I want to leave the jail and live with them. I think about them always and I miss them a lot. When I think about them, I feel bad and I want to hug my relatives. In my mom's house, I feel safe. Since I have been here, I talk with my mother very infrequently. I do not remember speaking with my sisters since I have been here and I remember speaking with my brother once.

ECF No. 13, Ex. C (Petitioner B.D.A.C.'s 10/25/18 Letter to the Court). As these statements illustrate, Respondents actions have substantially impaired the parent-child relationship. *See Kia P.*, 235 F.3d at 759.

The prolonged separation is not just subjectively painful; it is also objectively harmful. The medical evidence submitted in *Jacinto-Castanon de Nolasco*, which Petitioners submit here, is clear and convincing. Detained asylum-seeking children have "high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavior problems." Silva Decl., Ex. K (AAP Policy Statement) at 6. Experts agree that "even brief detention can cause psychological trauma and induce long-term mental health risks for children." *Id.* Earlier this year, the President of the American Academy of Pediatrics, after a tour of family-detention facilities, declared:

> Separating children from their parents contradicts everything we stand for as pediatricians – protecting and promoting children's health. In fact, highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress – known as toxic stress – can carry lifelong consequences for children.

Silva Decl, Ex. L (Kraft 5/8/2018 Statement). After quoting this medical evidence, *Jacinto Castanon de Nolasco* noted that "[s]eparation irreparably harms plaintiffs every ***minute*** it persists." 319 F. Supp. 3d at 503 (emphasis added). Here, the detention is measured in ***months***, not minutes. Its prolonged nature is incompatible with community standards of decency.

Sixth, B.D.'s detention retraumatizes him. ORR's records note that ORR staff and contractors have physically restrained B.D. on numerous occasions, including by using armbars and by placing him in a "restraint chair." *See* Silva Decl., Ex. G. Dr. Castillo opines that these actions

remind B.D. of the serial rapes he suffered as a child and harm his recovery. Silva Decl., Ex. B (Castillo Report) at ¶ 31. Dr. Castillo opines that B.D. needs trauma-informed mental health treatment and that such treatment should be provided on an outpatient basis so that B.D. can draw upon his connection to his family as he seeks to restore his legal competence. *Id.* at 30. These services await him upon his release from ORR custody. That the government would retraumatize B.D. while depriving him of these services by continuing his detention shocks the conscience.

Seventh, by continuing detention, Respondents ***increase*** the likelihood that he will be involved in future violence. Detainees have a substantive due-process right to safe conditions of confinement. *Ammons v. Wash. Dep't of Social & Health Servs*, 648 F.3d 1020, 1028 (9th Cir. 2011). Dr. Castillo assessed B.D.'s risk of future violence using the Structured Assessment of Violence Risk in Youth. Silva Decl., Ex. B (Castillo Evaluation) at ¶ 30. She opined that B.D.'s "risk for future violence falls within the moderate range if he is locked in a juvenile facility and falls within the low range if he is at home with family." *Id.* (emphasis omitted). She goes on to state:

> [B.D.] would benefit from being released from his current detention facility and being reunited with his mother and siblings as many of his psychiatric difficulties are connected to being separated from his family. It seems that being detained has triggered his self-harming behavior and aggressiveness. Removing the stressor would hence improve his psychological well-being.

Id. (emphasis added). Dr. Castillo, the only non-ORR-affiliated psychologist to conduct an evaluation in this case, believes that Respondents' purported "child-welfare" custody is harming B.D. Continuing his detention under these circumstances is barbaric and intolerable.

Eighth, Respondents' actions also shock the conscience in light of their obligations under the TVPRA and the *Flores* Settlement. The TVPRA requires the ORR to "promptly" place B.D. in the least restrictive environment that is in B.D.'s best interests. 8 U.S.C. § 1232(c)(2)(A). The *Flores* Settlement requires ORR to release B.D. to his mother unless an alternative placement is necessary either to secure his presence in immigration court or to ensure B.D.'s safety or the safety of others. (For the reasons given above, neither circumstance exists here. *See supra*, pp. 12-13.) Even in light of these obligations, Respondents refuse to adjudicate Ms. Cotto Yoc's family-reunification request. Not even the intervention of counsel appears insufficient to cause Respondents to follow the law. Respondent Smith's sole response to counsel's request for a

decision was to "elevate it" to Respondent Lloyd, who (without explanation) has failed to issue a release decision in the fourteen weeks that have passed since he received B.D.'s file in July. Silva Decl., Ex. I (E. Smith 11/7/18 email to T. Silva). This failure to act is shocking on its face—and even more shocking in light of the orders in *L.V.M.* and *Flores* that ***specifically prohibit Respondent Lloyd from personally adjudicating family-reunification requests***. *See infra*, p. 22-24.

Federal courts throughout the nation have held that the Trump Administration's family-separation policies shock the conscience.[9] In those cases, the duration of the separation ranged from two weeks to five months, and there was no evidence of the type of disability or conditions of confinement present here. B.D.'s particular need to be with his mother is obvious and their separation has lasted far longer. By the yardstick of those authorities—and our society's standards of common decency—Respondents' shock the conscience and thus violate the Constitution.

b. The detention violates B.D.'s right to liberty.

The general substantive due-process standard for civil detention is that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *accord Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004). Respondents' continued confinement of B.D. is unconstitutional under *Jackson*.

It is difficult to apply the *Jackson* standard because Respondents have ***never*** provided any formal justification for the detention even though it has lasted almost a full year. Still, the Court can conclude on this record that the detention fails the *Jackson* test. The *Flores* Settlement contains two exceptions to its general policy favoring release. the first is the need to "secure" the minor's "timely appearance before the INS or the immigration court." ECF No. 13, Ex. B (*Flores* Settlement) at ¶ 14. This rationale does not hold here for the reasons given above. Respondents' failure to abide by the *Flores* Settlement illustrates the absence of any "reasonable relation" between B.D.'s detention and a legitimate government interest.

Other indicia of unreasonableness show that Respondents' continued detention of B.D. is unreasonable. First, the "duration" of B.D.'s detention is vastly disproportionate to any conceivable

[9] *See supra*, p. 10, n.6 (citing cases).

government need. *Jackson*, 406 U.S. at 738. The government began its detention of B.D. on December 9, 2017—340 days before this brief was filed. Compare that to:

- *Ms. L*, where the adult convicted of misdemeanor illegal entry served a 25-day sentence.
- ORR custody generally, where the average duration of a child's placement in an ORR shelter before release is 41 days.[10]
- San Francisco County, where the average juvenile delinquency disposition (i.e., "sentence" imposed after a finding that the youth committed an offense) is just under 60 days.[11]
- California, where the maximum ***jail*** term for an ***adult convicted*** of an ordinary misdemeanor is 180 days. Cal. Penal Code § 19.

Of course, these comparisons are flawed (in the government's favor) because B.D. is not an adult and he is not facing criminal process. Still, they illustrate the gross disproportionality between the length of B.D.'s detention and the government's purported interest here.

Finally, the "nature" of detention is disproportionate to the "need." B.D. writes to the Court:

> My room has a locked door. We spend many hours in our rooms with the doors locked. Each day, we spend one hour and no more outside where we play basketball. Sometimes there are fights between the boys as they play. There are also fights inside the building.

ECF No. 13, Ex. C (Petitioner B.D.A.C.'s 10/25/18 Letter to the Court). The Ninth Circuit memorialized another child's testimony that the Yolo facility is like a "'real prison,' where the juvenile detainees were treated 'badly, like delinquents'" and where guards would "lock us up in the cells every night, to sleep on benches made out of cement with mattresses." *Flores v. Sessions*, 862 F.3d 863, 872 (9th Cir. 2017). The government cannot contend that detention of this nature "bear[s] some reasonable relation to the purpose for which [B.D.] is committed." *Jackson*, 406 U.S. at 738.

2. Respondents' detention of B.D. violates B.D.'s procedural due-process rights.

"Procedural due process imposes constraints on governmental decisions which deprive

[10] *See* ORR, "Facts & Data," https://www.acf.hhs.gov/orr/about/ucs/facts-and-data#lengthofstay. This statistic pertains to children in shelter settings, such as Casa Padre where ORR detained B.D. before he was "stepped up." ORR does not provide similar statistics for children in other settings.

[11] Juvenile Probation Department for the City and County of San Francisco, Monthly Report for July 2018 at 12, https://sfgov.org/juvprobation/sites/default/files/JPC_Report-July2018.pdf.

individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). When evaluating procedural due-process claims, courts consider

> "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 335. In the last two years, at least three courts—*Beltran v. Cardall*,[12] *Santos v. Smith*,[13] and *Maldonado v. Lloyd*[14]—have held that ORR's "process" for adjudicating family-reunification petition—such as Ms. Cotto Yoc's—is constitutionally infirm.[15]

The first *Mathews* factor, which considers the importance of the private interest at stake, militates heavily in favor of finding a constitutional violation. *Beltran*, which also considered ORR's refusal to release a minor to his mother, described the child habeas petitioner's "right to his mother's care" as "'deserving of the greatest solicitude.'" 222 F. Supp. 3d 476, 482 (E.D. Va. 2016) (quoting *Jordan by Jordan v. Jackson*, 15 F.3d 333, 345–46 (4th Cir. 1994)). *Santos* agreed that the family-reunification right is "fundamental" and "deserving of significant due process protections." 260 F. Supp. 3d at 612; *see also Maldonado*, 2018 WL 2089348 at *7 (similar). And there is no question that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The importance of the private interests at stake here requires that the government provide the most fulsome process guaranteed by due process.

This case highlights the importance of the second *Mathews* factor, which considers the probative value of additional safeguards. Over forty years ago, the Supreme Court declared that the state must provide an adversarial hearing before it can interfere in the parent-child relationship. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). In California, for example, if the state takes child-

[12] *Beltran v. Cardall*, 222 F. Supp. 3d 476 (E.D. Va. 2016) (same).

[13] *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017).

[14] *Maldonado v. Lloyd*, No.18-cv-3089 (JFK), 2018 WL 2089348, at *10 (S.D.N.Y. May 4, 2018).

[15] In addition, *Saravia* held that ORR violated due process by failing to provide youth hearings if they were recommitted to ORR custody after being placed with a sponsor. 280 F. Supp. 3d at 1197.

welfare custody of a minor, it must (1) provide parents with written notice of (2) an adversarial hearing (which must be conducted within three court ***days*** of the child's removal from the home) (3) before a judge, (4) during which the parent has the opportunity to present and confront evidence including the social worker's report, and at which (5) the state bears the burden of proof and (6) both parents and children have the right to counsel.[16]

None of those protections are present here. ***First***, it appears that ORR never provided either Petitioner with written notice of their rights to family-reunification or with any information about ORR's process. *Beltran* held that the absence of such information weighs in favor of finding a due-process violation, 222 F. Supp. 3d at 483, and *Santos* held that it is unconstitutional to require parents to initiate the reunification process, 260 F. Supp. 3d at 613. ***Second***, Respondents have failed to act promptly. *Maldonado* noted that an eleven-month delay was a "significant" constitutional deficiency in ORR's process. 2018 WL 2089348, at *8. *Santos* also cites the "very lengthy delays in processing Ms. Santos's petition for reunification and, in particular, the extensive delay in making an initial determination" as a reason for finding a due-process violation. 260 F. Supp. 3d at 613. ***Third***, ORR failed to provide Petitioners with a hearing or an opportunity to present or confront evidence. Both *Beltran* and *Santos* fault ORR for failing to make the parents "aware of any of the evidence or factual findings upon which ORR relied in retaining custody." *Santos*, 260 F. Supp. 3d at 612; *accord Beltran*, 222 F. Supp. 3d at 484 ("It does not appear that the contractor ever informed Petitioner of her findings, or that Petitioner had an opportunity to contest them."). ***Fourth***, ORR failed to make a neutral decisionmaker available. The *Saravia* injunction requires the government to provide hearings before neutral decisionmakers before subjecting the plaintiff class to ORR custody. *Saravia*, 280 F. Supp. 3d at 1197. ***Fifth***, ORR requires Ms. Cotto Yoc to bear the burden of proving that B.D. should reside with her. But this is the exact opposite of the constitutional command; due process requires the government to bear the burden of proof in this situation. *Santos*, 260 F. Supp. 3d at 613; *Beltran*, 222 F. Supp. 3d at 485; *Maldonado*, 2018 WL 2089348, at *9. ***Sixth***—and fundamentally—***due process requires the government to make a decision***. In both *Beltran* and *Santos*, ORR at least gave a written decision. *Santos*, 260 F. Supp. 3d

[16] *See* Cal. Welf. & Inst. Code §§ 290.1, 290.2, 300, 311, 313, 315, 319, 349.

at 612; *Beltran*, 222 F. Supp. 3d at 485. Here, not only is there no writing, Respondents have not made a decision and they refuse to provide a timeline for taking action. *See* Silva Decl, Exs. H & I. The "process" provided in this case is patently inadequate.

The third *Mathews* prong considers the governmental burden in administering an alternative procedure. In light of the importance of the individual right at stake, the government's interest in avoiding administrative burden cannot justify the wholly inadequate procedures it provided to Petitioners. All fifty states provide adversarial hearings in the child-welfare context and there is no reason for the federal government to depart from that uniform standard. Moreover, *Santos* observes that in 2014 "roughly 93% of children entrusted to ORR's care . . . were released to custodians after only a brief stay in custody." 260 F. Supp. 3d at 615. Thus, any additional burden would arise in only a small fraction of cases.

Weighed against each other, the *Mathews* prongs illustrates that ORR has failed to provide B.D. with procedural due process over the course of his eleven months of detention.

3. Respondents' detention of B.D. violates the TVPRA.

The Court may grant habeas relief if the challenged custody violates the "laws . . . of the United States." 28 U.S.C. § 2241(c)(3). B.D.'s prolonged detention violates the TVPRA and the *Flores* Settlement, which, as a judicially ordered decree, is the law of the United States.

First, Respondents have violated their statutory obligation to act "promptly" by failing to adjudicate the family-reunification request. 8 U.S.C. § 1232(c)(2)(A). The statutory text reads:

> [A]n unaccompanied alien child in the custody of the Secretary of [HHS] ***shall*** be promptly placed in the least restrictive setting that is in the best interest of the child.

Id. (emphasis added). By including the word "shall," Congress directed ORR to act promptly. *U.S. v. Carter*, 742 F.3d 440, 446 (9th Cir. 2014). Indeed, other courts have referred to this provision as the TVPRA "mandate." *L.V.M.*, 318 F. Supp. 3d at 608. Petitioners have violated this mandate.

Second, for the reasons Petitioners give above, there can be no dispute that the "least restrictive setting" that is in B.D.'s "best interest" is at home with his family. Placement with family will foster B.D.'s restoration to competency. Appropriate mental health care services of the type recommended by Dr. Castillo await B.D. upon his release. *See supra*, p. 12. Ms. Cotto Yoc and her son enjoy a "close, positive relationship," one that Dr. Castillo believes will be the cornerstone of

B.D.'s competency-restoration efforts. *See supra*, p. 15. By contrast, continued detention is exacerbating B.D.'s mental health struggles and impeding his recovery. He is at greater risk of future violence in ORR's facility than outside of it. *See id.* The TVPRA requires Respondents to place B.D. in the least restrictive environment consistent with his best interests. *See* 8 U.S.C. § 1232(c)(2)(A). That setting is with his mother in Ohio, not a juvenile hall.

Third, the *Flores* Settlement mandates release to an available parent unless continued detention is necessary to bring the youth before immigration authorities or to ensure the safety of the youth or others. As discussed above, neither condition is present here. *See supra*, p. 12-13. Respondents' violation of the statutory and *Flores* obligations to B.D. provide the Court with an independent, statutory basis to order habeas relief. *See* 28 U.S.C. § 2241(c)(3).

4. Respondents' actions violate the Administrative Procedures Act.

This Court may "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right"; "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A-D). The Court can also "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). Here, Respondents violate the APA in at least two distinct ways.

First, Respondents' "elevation" of B.D.'s release decision to Respondent Lloyd's office is not in accordance with the law. *See id.* at § 706(2). Shortly after he became ORR Director, Respondent Lloyd instituted a "director-review policy" which required Respondent Lloyd or his designee to approve any release recommendation for a child who had ever been in detained in a secure or staff-secure facility. *L.V.M.*, 318 F. Supp. 3d at 610-11. ORR concedes that the director-review policy "imposes significant delays" in the release of children subject to the policy, such as B.D. *Id.* at 618. On June 27, 2018, the *L.V.M.* court held that Respondent Lloyd's implementation of the director-review policy violated the APA. *L.V.M.* vacated the director-review policy. The following day, ORR issued the following directive:

> Starting today, Federal Field Specialists (FFS) no longer elevate for the Director's review the release decisions for unaccompanied alien children (UAC) who are in staff secure or secure facilities or who have previously been in staff secure or secure

> facilities. FFS now make the final decision on these releases. . . . If a case is in the clearance process now, the FFS should make the final decision on the release.

Silva Decl., Ex. J (A. Bena 6/28/18 email to Federal Field Specialists). Under this directive—which implements the *L.V.M.* order—Respondents cannot elevate B.D.'s release decision to Respondent Lloyd. But that is ***exactly*** what Respondents have done. In written correspondence, Respondent Smith confirmed that B.D.'s release decision has been pending in Respondent Lloyd's office since before July 27. Silva Decl., Ex. I. Under ORR's implementation of the *L.V.M.* order, the release decision is Respondent Smith's to make, and ORR's contrary handling of Ms. Cotto Yoc's family-reunification request is not in accordance with the law. 5 U.S.C. § 706(2)(A).

Second, as B.D. explains above, Respondents have failed to act "promptly," as required by the TVPRA. Indeed, "the director review policy is antithetical to the statutory goal of prompt release of [unaccompanied minors] to suitable sponsors." *L.V.M.*, 318 F. Supp. 3d at 619-20. Respondent's unreasonable delay here violates 5 U.S.C. § 706(2)(c).

5. Respondents violate Section 504 of the Rehabilitation Act.

Section 504 prohibits government discrimination on the basis of disability. ORR "stepped up" B.D. to a secure facility on the sole basis of the December 2017 statement. Silva Decl., Ex. E (Transfer Request) at 2. That statement is a manifestation of B.D.'s mental-health disability, which manifests as an inability to reliably narrate his life story. Silva Decl., Ex. B (Castillo Eval.) at ¶ 29. (Compounding matters, ORR continues to detain B.D. in secure facilities even though it now knows the December 2017 statement to be false. Silva Decl., Ex. A (Home Study Report) at 11.) Thus, as applied to B.D., the director-release policy is a "method of administration" that substantially impairs the "accomplishment of the objective" of ORR's program—release to family," 42 C.F.R. § 84.4(b)(4).

C. Because Respondents' detention of B.D. violates Ms. Cotto Yoc's constitutional rights, the Court should issue a preliminary injunction ordering B.D.'s release.

When considering the motion for a preliminary injunction, the Court will consider (1) Ms. Cotto Yoc's likelihood of success on the merits, (2) the likelihood of irreparable harm that would result if an injunction were not issued, (3) whether balance of equities tips in her favor, and (4) whether an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22-

24 (2008). Ms. Cotto Yoc need only raise "serious questions" regarding about her likelihood of prevailing to make the first *Winters* showing. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011). A preliminary injunction is appropriate when a movant raises "serious questions going to the merits" and the "balance of hardships tips sharply in the plaintiff's favor," provided that the other elements for relief also are satisfied. *Id.* at 1134–35.

1. Ms. Cotto Yoc is likely to succeed on her due-process claims.

Ms. Cotto Yoc need only raise "serious questions" involving the likelihood that she will prevail on the merits. She has done so. The substantive family integrity right is "reciprocal" between parent and child. *Duchesne*, 566 F.2d at 825. Indeed, *Ms. L*, *Jacinto-Castanon de Nolasco*, and *M.G.U.* all assess the parent's substantive due-process right. Thus, the discussion regarding B.D.'s substantive due-process rights applies with equal force to the analysis of Ms. Cotto Yoc's reciprocal rights. Ms. Cotto Yoc's fitness as a parent means the substantive due-process clause prohibits the government from separating her from her son. *See Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 501. She has the right to arrange for her son's medical care, to manage her son's legal affairs, and to "make decisions concerning the care, custody, and control" of B.D. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.); *accord Wallis*, 202 F.3d at 1141; *Ms. L*, 310 F. Supp. 3d at 1144. B.D.'s prolonged detention—which increases B.D. risk of future violence, *supra*, p. 15—deprives Ms. Cotto Yoc of the right to make such decisions and to protect her son.

Moreover, Ms. Cotto Yoc's government-imposed prolonged separation from her son has caused her to experience significant pain. She declares:

> I cannot adequately describe in words the anguish that B.D.A.C.'s detention has caused me. . . . [T]he U.S. government has kept my son in a locked jail cell for over ten months. My son is suffering. He is not receiving the mental health and medical treatment I know he needs—treatment that I have been willing and capable of arranging for him since he was eleven and we lived in Guatemala and that I have arranged for him to receive in Ohio. On the phone, I can tell that he sounds depressed. I am depressed about the situation. As a mother, my goal is to give my children a better chance at life than I have had. I want to shield them from the abuse that I and they have suffered, and I cannot do that through locked doors. I think about B.D.A.C. every day and cannot wait for the day our family is reunited.

ECF No. 13, Ex. A (Cotto Yoc Decl.) at ¶ 23. This testimony makes clear that "[t]here is no question that defendants have directly and substantially burdened [Ms. Cotto Yoc's] right to family integrity." *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 501.

Similarly, Ms. Cotto Yoc is likely to succeed on her procedural due-process claim. Parents have a right to notice and an opportunity to respond at an adversarial hearing before the government infringes upon the parent-child relationship. *Stanley*, 405 U.S. at 649. The *Mathews* analysis regarding B.D.'s procedural due-process rights thus demonstrates that the government violated Ms. Cotto Yoc's reciprocal rights here. *See supra*, p. 18-20.

2. The remaining *Winters* factors weigh heavily in favor of an injunction.

"It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) (internal quotations and citation omitted). No additional showing is necessary on the irreparable harm standard. *See id.* But if the Court does engage in further analysis, the irreparable showing is compelling here for the reasons given in *Jacinto-Castanon de Nolasco*:

> As to whether plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief, there can be no dispute. Ms. Jacinto-Castanon desperately wants to be reunited with her sons. She has offered overwhelming evidence in her own words and from medical experts describing the grave and lasting consequences of separating parents from their young children.

319 F. Supp. 3d at 502. The same is true here. Here, the gravity of the irreparable harm combined with Ms. Cotto Yoc's likelihood of prevailing on the merits favors granting a preliminary injunction. *See Alliance*, 632 F.3d at 1134-35.

The balance of equities tips in Ms. Cotto Yoc's favor because the harm she continues to suffer is "obvious and intense." *Jacinto-Castanen de Nolasco*, 319 F. Supp. 3d at 503. By contrast, Respondents cannot complain that they can be harmed by a court order compelling them to do the job Congress has directed them to do. *See Rodriguez*, 715 F.3d at 1145. And "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotations and citations omitted).

D. Release is the only relief that can remedy Respondents' violations of the law.

The Court should order Respondents to immediately release B.D. to his mother's care. Petitioners discuss five substantive due-process cases above. All five challenge prolonged family separation caused by the Trump Administration's immigration-detention policies. All five order family reunification. In the three procedural due-process cases, all of which involved ORR, the

courts also ordered immediate family reunification, holding that it would be pointless to order ORR to hold a hearing while prolonging unconstitutional family separation.[17] The Court should order the same relief here because family-reunification is clearly in B.D.'s best interest. Ms. Cotto Yoc has addressed the principal concern raised in the Home Study Report by arranging for B.D. to receive mental health treatment aligned with Dr. Castillo's recommendations. ECF No. 13, Ex. D (enrollment verifications). She is participating in parenting classes. *Id.* She agreed to modify her work schedule so that she can supervise B.D. after school. Silva Decl., Ex. A (Home Study Report) at 17. The "due process violations have occurred and, under the specific facts of this case, cannot be cured at this point with a belated hearing," which at this point would serve no purpose other than to prolong B.D.'s detention. *Santos*, 260 F. Supp. 3d at 616.

IV. CONCLUSION

Respondents have separated B.D. and his mother for almost a year. Mother and son can never recover that time together. But they will be able to move forward with their lives as soon as they are reunited, a circumstance this Court can bring about. Because Respondents' acts and omissions violate Petitioners' constitutional and statutory rights, the Court should issue an order requiring B.D.'s immediate release to his mother's care.

Dated: November 14, 2018

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[17] *Santos*, 260 F. Supp. 3d at 616; *Beltran*, 222 F. Supp. 3d at 489 ("The Court will therefore grant the Petition for a Writ of Habeas Corpus outright and require that RMB be released to Petitioner's care and custody."); *Maldonado*, 2018 WL 2089348, at *11 ("[T]he Court concludes that EHE's immediate release into Ms. Maldonado's care and custody is appropriate, in lieu of mandating additional process.").